In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-744

JOE FIERRO-SOZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on four counts of illegally importing and possessing marihuana with intent to distribute it, and conspiring to commit those offenses, in violation of 21 U.S.C. 841(a)(1), 952, 960, 963. He was sentenced to concurrent five-year prison terms. The court of appeals affirmed (Pet. App.).[1] The only issue in the case turns

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[1] Petitioner's brother, Jesse Fierro-Soza was tried with petitioner and was convicted on one count of having possessed marihuana with intent to distribute. The jury acquitted him on the remaining three counts. The conviction on the one count was reversed on appeal (Pet. App.).

on the propriety of certain comments made by the Assistant United States Attorney in his summation and the effect of curative instructions given by the trial judge.

1. On August 27, 1971, Teodoro Hernandez-Munoz, who lived and worked in Mexicali, Mexico, was approached by two men named David and Poli, who asked him if they could borrow his car for eighty dollars (T. 28, 30, 32, 33). When he agreed, the two men took the car and indicated to Hernandez that they were going to go to San Luis, Mexico, to pick up some marihuana (T. 34-35). On the following day, the two men again contacted Hernandez and told him that they wanted him to drive the car, which had been loaded with marihuana, across the border into the United States (T. 35-36). Hernandez agreed, and the men, who were under observation by federal agents, then proceeded to a remote desert area near the border and looked for border patrols with binoculars from atop a hill near the canal that forms the border between Mexico and the United States (T. 36-37). The men were then joined by a second car. Hernandez, who had been told by Poli to follow the second car, crossed the border after one of the men opened the gate (T. 37-38, 41-42). Hernandez then proceeded to a store in Calexico, California, where he had been told by Poli that David would be waiting (T. 49-51). At the store, David told Hernandez to drive to Brawley, California, where they stopped and David made a telephone call (T. 53-54). They then went to a bar where they were joined by petitioner and his brother. David identified petitioner to Hernandez by the name Cheppy (T. 54-56). When the group went to another bar, petitioner did not accompany them, ex-

plaining that he had to check with the people who were going to buy the marihuana (T. 57-59).

At approximately 4:30 p.m., petitioner returned to the bar and told the men that there would be a delay, since the people who were to buy the marihuana had not yet arrived. The men then went to petitioner's house (T. 61-62). After a while, Hernandez and petitioner's brother left the house to purchase some beer. On the way to the liquor store, petitioner's brother talked about getting some marihuana out of the trunk of the car that Hernandez had driven across the border. They then went to the car, which was still parked in Brawley, and Hernandez removed some marihuana from the trunk. The men then returned to petitioner's house and smoked the marihuana (T. 63-65).

At approximately 8:30 p.m., petitioner told Hernandez to take his car to a hotel in Brawley. At his arrival at the car, Hernandez discovered that he no longer had the keys. He then went to a bar where petitioner's brother was drinking. Sometime later Hernandez and petitioner's brother returned to the car and petitioner's brother suggested that they push the car to the hotel. As they were pushing the car they were arrested by the police (T. 69-72).

2. Hernandez testified as a witness for the government. During cross-examination, petitioner's counsel asked if any promises had been made to him regarding his testimony. Hernandez stated that he believed that the government would give him a lesser sentence and would "protect my family" (T. 102-103).

Alfredo Cardenas-Lopez, who also testified on behalf of the government, stated that while he and petitioner

were in the San Diego County jail together, petitioner gave him his phone number and told Cardenas to get in touch with him so that petitioner could send him marihuana from Mexico for Cardenas to sell to his clients in Los Angeles (T. 140-142). On cross-examination, Cardenas indicated that customs agents told him that they would obtain permits for his family to reside in the United States so that they could be protected.

During closing argument, petitioner's counsel emphatically contended that both Cardenas and Hernandez were lying, citing the government's promise to bring their families into the United States as one of the main incentives for the allegedly perjurious testimony (T. 438-439). During the government's rebuttal, the prosecution argued that since smugglers like petitioner and his brother often make threats against witnesses' families who live in Mexico, the government must bring the families into the United States to protect them (T. 450-451). Defense counsel objected and the court sustained the objection. Shortly thereafter, the court instructed the jury that arguments of counsel are not evidence and that the prosecutor's comment should be disregarded (T. 455-456):

> On the other hand, the prosecution was arguing inferences they felt they could argue as to why the Government had agreed to protect the families of the witnesses, or allow them to immigrate, or whatever it might be, into the United States of America in relationship to their testifying and expanded that further in relation to inferences he wished to draw as to why that would be. Of course, there is no evidence in this case that either of these de-

> fendants have made any threats against families or otherwise. So you should not at all draw any inference that any such thing has occurred and that is why I sustained the objection.

The court of appeals, while holding the prosecutor's comments to have been improper, stated that "the corrective actions by the trial court, combined with the very substantial evidence of the guilt of Joe Fierro-Soza, convince us that the misconduct was not prejudicial" (Pet. App. 16a-17a).

The cases relied upon by petitioner for the proposition that "the jury * * * could not be reasonably expected to have followed the trial judge's instructions to ignore the comments" (Pet. 12) are inapposite. Those cases mainly involve the introduction of highly probative and prejudicial evidence in the way of confessions of an accomplice in which "the jury was * * * asked to perform the mental gymnastics of considering an incriminating statement against only one of two defendants in a joint trial." *Frazier* v. *Cupp*, 394 U.S. 731, 735. But, as Mr. Justice Harlan observed in writing for the Court in *Spencer* v. *Texas*, 385 U.S. 554, 565, referring to ~~the many of the same cases~~ a case similar to those cited by petitioner:

> * * * It would be extravagant in the extreme to take [~~these~~ that decisions] as evincing a general distrust on the part of this Court of the ability of juries to approach their task responsibly and to sort out discrete issues given to them under proper instructions by the judge in a criminal case, or as standing for the proposition that limiting instructions can

never purge the erroneous introduction of evidence or limit evidence to its rightful purpose. * * *

The court of appeals here properly concluded that in this case the instructions "purged" any prejudice resulting from the prosecutor's comments. The fact that the jury acquitted petitioner's brother on three of the four counts, even though he was equally implicated in the prosecutor's comments, shows that the jury was able to perform its function objectively.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

☆ U.S. Government Printing Office: 1972—492-182/410